No. 80-231

IN THE

SUPREME COURT OF THE UNITED STATES

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF MID-AMERICA LEGAL FOUNDATION SUPPORTING THE POSITION OF APPELLEES

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
1. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress Under the Commerce Clause Because it Regulates Particularly Local Aspects of Interstate Activity Without Regulating Any Related Interstate Activity.	5
2. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress Under the Commerce Clause Because it is Not Plainly Adapted to Regulating Commerce Among the States.	8
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)	5
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	6, 7, 9
Indiana v. *Andrus*, No. 78-500 (S.D.Ind. June 10, 1980)	2, 8, 9
Katzenbach v. *McClung*, 379 U.S. 294 (1964).	5
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	8, 10
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	8, 9
Perez v. *United States*, 402 U.S. 146 (1971)	6, 7
Polish Nat'l Alliance v. *NLRB*, 322 U.S. 643 (1944)	5
United States v. *Darby*, 312 U.S. 100 (1941)	5, 6, 8
Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926)	6
Virginia Surface Mining and Reclamation Ass'n v. *Andrus*, 483 F.Supp. 425 (1980)	2, 10
Wickard v. *Filburn*, 317 U.S. 111 (1942)	6, 7
Constitutional Provisions	
Commerce Clause, U.S. CONST. art I, § 8, cl. 3	*passim*
Necessary and Proper Clause, U.S. CONST. art. 1, § 8, cl. 18	4, 8, 9, 10
Tenth Amendment, U.S. CONST. amend. X	5, 8, 9
Statutes	
The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*	*passim*
§ 1201g (purpose of Act)	7
§ 1265 (original contour)	2, 4
§ 1268 (pre-mining productivity)	2, 4
§ 1269 (prime farmlands)	2, 3, 4
Other	
Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W.VA.L.REV. 553 (1979)	7

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INTEREST OF AMICUS

This brief is submitted as *amicus curiae* on behalf of Mid-America Legal Foundation ("Mid-America"). The written consents of all parties are filed with the Clerk of the Court.

Mid-America, based upon its expertise and purpose, has an interest in the disposition of this case. Mid-America was organized in 1975 as an Illinois not-for-profit corporation to

engage in study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the "original contour" and "prime farmland" provisions of the Surface Mining Control and Reclamation Act of 1977 [hereinafter the "Act"], 30 U.S.C. §§ 1265, 1268 and 1269, are not plainly adapted to regulating commerce among the states. Neither the parties nor the other *amici* have focused on this argument. Thus, it is in the interest of the Court to consider this approach to the case.

Mid-America supports a strong legislative effort to require land preservation and reclamation. However, Congress cannot employ irrational means to achieve a legitimate end. Since there are rational means of equalizing competition among coal producers variously affected by state reclamation requirements and of achieving the ultimate aesthetic goal of land reclamation, the judgment of the district court should be affirmed.[1]

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[1] *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, Docket Nos. 79-1538 and 79-1596, on appeals from the Western District of Virginia have been consolidated with the Indiana decision which is the focus of this brief. *Amicus* believes that the original contour aspect of the Virginia decision should be affirmed for essentially the same reasons advanced herein.

SUMMARY OF ARGUMENT

While individual states can regulate surface mining reclamation because of its inherently local character, Congress may regulate the same activity only if such regulation is incidental to a valid regulation of commerce among the states. This Court has never held that simply because a commodity is traded in interstate commerce, any traditionally local activity related to that commodity is subject to federal regulation for any purpose. The prime farmland provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1269, is not a reasonable incident to congressional regulation of interstate commerce but is rather the end in itself.

Although Congress could act under the Commerce Clause to equalize interstate competition in coal production, maintain national farmland productivity and prevent interstate pollution, the prime farmlands provision is not a rational means for the accomplishment of these objectives. The provision regulates only one of many inequalities generated by various state requirements, touches only one of many uses which may damage or eliminate farmland, and does not add any protection against interstate pollution which is not provided by other more comprehensive federal laws. Thus, imposition of the prime farmland provision on any state or local government exceeds congressional authority because it is not plainly adapted or necessary and proper to any valid exercise of the commerce power.

ARGUMENT

The 1977 Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (hereinafter the "Act"), requires, *inter alia,* that surface mined prime farmland be returned to prime farmland condition, § 1269. The Act also requires that surface mined land be returned to approximate original contour, § 1265, and that the productivity of any surface mined land equal its pre-mining productivity as measured by its pre-mining use, § 1268. The Act imposes the same requirements on all coal producers in all states despite substantially different local conditions. Although the Act imposes substantial economic burdens by requiring the return of farmland to its pre-mining condition, the Act does not require that the land be used for its pre-mining purpose or maintained in that condition.

The power of Congress to regulate the aesthetics of local scenery in the context of the legislation here at issue can be derived only from the Commerce Clause and the related provisions of the Necessary and Proper Clause. Clearly, taxing and spending powers are not at issue. Also not involved are interstate highways, interstate air or water quality or even coal intended for shipment in interstate commerce.

1. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress under the Commerce Clause Because it Regulates Particularly Local Aspects of Interstate Activity Without Regulating Any Related Interstate Activity.

Although individual states can regulate surface mining reclamation because of its inherently local character, Congress is without power to regulate local activities "which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general power of government." *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 195 (1824); *Katzenbach* v. *McClung,* 379 U.S. 294, 302 (1964). "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity." *Polish Nat'l Alliance* v. *NLRB,* 322 U.S. 643, 650 (1944).

Appellants apply simplistic scholastic reasoning by arguing that because coal is traded in interstate commerce, Congress may regulate any condition under which it is produced. Brief for Appellants at 11-12. This Court has never held that Congress may regulate particularly local aspects of interstate commerce without also regulating a concomitant general interstate commercial activity or at least requiring that the local activity be conducted in the production of articles intended for interstate shipment. *United States* v. *Darby,* 312 U.S. 100, 117-118 (1941).

In *Darby* this Court upheld a provision of the Fair Labor Standards Act of 1938 which fixed the minimum wages and maximum hours for employees engaged in the production of goods intended for interstate commerce. This Court concluded that the statute was both a valid exercise of the commerce power and consistent with the Fifth and Tenth Amendments. *Id.* at 111. The power to regulate wages in *Darby* was incidental to and flowed from the power to regulate commerce among the several states.

Darby can be readily distinguished from the instant case. Here Congress chose to regulate land use aesthetics an end in itself. Such aesthetics traditionally have been matters of local concern. Their regulation in the prime farmland provision of the Act is neither incidental to a valid exercise of the commerce power nor related to a general interstate commercial activity. *See Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Several cases involving the Commerce Clause are useful in an analysis of the question here at issue. In *Perez* v. *United States*, 402 U.S. 146 (1971), this Court upheld the federal conviction of a local loan shark because of the relationship between loan sharking on a local level and interstate crime. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), this Court upheld application of federal civil rights laws to local public accommodations where Congress prohibited discrimination in all public accomodations affecting commerce among the states. And finally, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court upheld the application of federal wheat production regulations to a small farm which sowed only twenty-three acres for its own use because the law as a whole regulated the national wheat market. In all three cases, this Court sustained congressional regulation of intrastate activity which was related to a larger interstate scheme.

An entirely different question concerning the scope of the commerce power would have been raised in these cases if Congress had prohibited only local loan sharking or discrimination only in those accommodations which had the least effect on interstate commerce, or had regulated only farms which raised fewer than twenty-five acres of wheat and consumed their own production. Yet this is precisely the type of situation presented to this Court by the instant case, since the prime farmlands provision of the Act regulates a local activity without regulating any broader interstate commerce.

A brief examination of the two major justifications for the prime farmlands provision demonstrates that the Act regulates only intrastate aspects of coal mining. The primary justification is equalization of interstate competition among coal companies

by imposition of the same burdens on all coal producers in all states. *See* 30 U.S.C. § 1201(g) (Supp. 1979); Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect,* 81 W.VA.L.REV. 553 (1979). However, the Act is not designed to equalize all, many, or even the most substantial, of the various burdens imposed by different state and local governments or natural conditions. The Act does not deal with the varying costs of producing anthracite or bituminous coal, or of marketing high-sulfur or low-sulfur coal, or of mining coal which is found close to the surface or buried many meters below. Instead, the Act is designed to affect only a single aspect of surface mining, namely, the burdens of reclamation imposed by some states. The effect of the Act on local governmental concerns is not incidental to any comprehensive federal market regulation. The effect on the aesthetics of local scenery is itself the end.

Neither can the prime farmlands provision be justified as a national farmland preservation act. *See* Brief for Appellants at 12-16. The Act does not prohibit any damage to prime farmlands by any use other than surface mining. If, either before mining or after reclamation, the land owner decides to build a business, a church or even a massage parlor, then federal law will not stop him. Mid-America does not maintain that Congress could not pass a comprehensive prime farmlands preservation act, but Congress has not elected to do so. The prime farmlands provision, lacking any relation to interstate commerce, must fall as an invalid regulation of local activity.[2] *Perez, Heart of Atlanta* and *Wickard* are inapposite.

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[2] Appellees also argue that the act regulates interstate commerce in coal by prohibiting that commerce if it comes at the expense of either the environment or the public safety. Brief for Appellants at 12. The public safety argument refers primarily to provisions of the Act not addressed here but concerning the areas containing highways or buildings that are designated as unsuitable for mining. Brief for Appellants at 34-36. The district court found the environmental argument unsupported by the evidence, especially since any potential pollution problems were covered by other provisions of federal law. Brief for Appellants at 16-18.

Because of the economic and aesthetic ramifications of surface mining reclamation, any state's regulatory policy in this area must be the result of conscious and deliberate consideration of particularly local factors. Federal intrusion into such a local concern has no constitutional basis. Mid-America is not raising the Tenth Amendment argument that the regulation directly affects essential and traditional state governmental functions. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). For this brief, it is clear that the "amendment states but a truism that all is retained which has not been surrendered." *United States* v. *Darby,* 312 U.S. 100, 124 (1941). Under the Constitution, the states simply have not surrendered to the federal government the power to regulate intrastate activities except to the extent such regulation is incidental to a valid exercise of an enumerated power.

2. The Prime Farmlands Provision of the Surface Mining Act Exceeds the Power of Congress under the Commerce Clause Because it is Not Plainly Adapted to Regulating Commerce Among the States.

The district court ruled that the prime farmlands provision is directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. It further held that the regulation is not a rational means of achieving the legitimate end of removing any substantial adverse effect on interstate commerce. *Indiana* v. *Andrus,* No. 78-500 (S.D. Ind. June 10, 1980) at 14-15.

Every act of Congress must be based on a necessary and proper exercise of some constitutional power. In *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 430 (1819), Chief Justice Marshall delineated the standard of the Necessary and Proper Clause: "[l]et the end be legitimate, let it be within the scope of the Constitution, and all means . . . , which are plainly adapted to that end [and] which are not prohibited . . . , are constitutional." The words "not prohibited" refer to specific limitations on the enumerated powers, such as the Tenth Amendment's limitation on the exercise of the commerce power.

National League of Cities v. *Usery,* 426 U.S. 833, 842-43 (1976). The words "plainly adapted" incorporate into every exercise of constitutional power a rational basis test: the means chosen to exercise the power must have a rational or reasonable relation to "the end permitted by the Constitution." *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 262 (1964); *National League of Cities* v. *Usery,* 426 U.S. 833, 840 (1976); *Indiana* v. *Andrus,* No. 78-500 (S.D. Ind. June 10, 1980) at 9-10.

Congress may select any reasonable and rational means necessary to regulate commerce among the several states. The appellees and other supporting *amici* are presenting Tenth Amendment and Due Process arguments which need not be restated here. Mid-America argues that the prime farmlands provision is not rational as a regulation of commerce, that is, not plainly adapted to equalizing the costs of coal production, maintaining farmland productivity, or preventing pollution. It affects one of many variable costs of coal production in different localities. It simply is not rational to handicap Indiana coal producers and state legislative power over land use in order to equalize the economic handicap imposed on producers by other states which do not have prime farmland covering virtually all mineable coal.

The prime farmlands provision also does not rationally conserve farmland, since it only requires reclamation. The Act as a whole is not concerned with "the actual use to which an owner may choose to put the land immediately following reclamation." Brief for Appellants at 23. The reclamation required by the prime farmlands provision is especially unnecessary where there is little demand for prime farmland or where there is no reasonable prospect of farming as the post-mining use. Congress apparently is concerned about the appearance of the land, but not about its actual potential for productivity. Furthermore, it is not rational to require farm productivity where the federal government is paying Indiana farmers not to grow crops on many times more acres each year than would be surface mined in twenty years.

Finally, the prime farmlands provision cannot be transformed into rational legislation by asserting that it protects the environment. Where the environmental aspect involved is already protected more comprehensively by other provisions of federal law, another burdensome regulation which does not add any other protection against interstate pollution cannot be characterized as plainly adapted to protect the environment. The prime farmlands provision is therefore not a rational regulation of commerce among the states. Congress does not have power to impose unreasonable or irrational laws. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819).

There are rational means by which Congress can equalize competition, conserve farmland, prevent pollution and even achieve the ultimate goal of aesthetic local scenery. Congress could, for example, tax the production of all coal and spend the money thereby collected to encourage a return to original contour and prime farmland. Such inducement could achieve the ultimate aesthetic goals without imposing oppressive burdens. *Cf. Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F.Supp. 425, 432-33 (1980) (coercion-inducement distinction in Tenth Amendment context). But Congress cannot, under any power, irrationally coerce such reclamation.

CONCLUSION

For the foregoing reasons, the judgments of the Southern District of Indiana and the Western District of Virginia should be affirmed.

Respectfully submitted,

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